Supreme Court, U.S.
FILED
FEB 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-796

In the Supreme Court of the United States

OCTOBER TERM, 1988

IN THE SUPREME COURT OF THE UNITED STATES

Tommy McIntosh, Charles Marvin Hayes, and Maurice Crawford ..... *Petitioners*

V.

State of Arkansas ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, State of Arkansas, responds to petitioners' Petition for Writ of Certiorari to the Supreme Court of Arkansas.

JURISDICTION

Respondent acknowledges that this Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. § 1254 (1).

REASONS FOR DENYING THE WRIT

I.

THE ARKANSAS SUPREME COURT DID NOT ERR IN REFUSING TO ADDRESS THE PETITIONERS' CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHICH WAS RAISED FOR THE FIRST TIME ON APPEAL.

The petitioners argue that pursuant to the authority of *Wood v. Georgia*, 450 U.S. 261 (1981), it was error for the Arkansas Supreme Court to refuse to address a claim of ineffective assistance of counsel which was raised for the first time on direct appeal. The petitioners assert that defense counsel, who represented all three of the petitioners at a joint trial, suffered from a conflict of interest and that the conflict of interest is apparent on the face of the trial record.

In the instant case, the petitioners were stopped by an Arkansas State Trooper for speeding. Pursuant to a consent to search, a large quantity of cocaine was found in the rear of the rented van in which the petitioners were travelling. At trial all of the petitioners denied any connection with or knowledge of cocaine. Based on their testimony, the defense attorney argued that the petitioners had been duped into serving as couriers of the cocaine.

In *Wood*, this Court vacated the lower court's judgment and remanded the case with instructions that it be returned to the trial court for a hearing on a conflict of interest issue. Certiorari had originally been granted on an equal protection issue, but the Court found it unnecessary to reach that issue because a conflict of interest was strongly suggested by the record. In the *Wood* case, petitions to revoke probation had been filed against several alleged pornographers. The petitioners were represented by counsel retained by their former employer. The record showed that the employer had promised to pay for their

legal counsel, pay any fines and post bond if they got into trouble because of their work. The employer then withheld payment on the fines, which resulted in the petitions to revoke being filed. Counsel hired by the employer then sought to assert a violation of equal protection resulting from the revocation due to the petitioners' inability to pay, a situation the employer had created. The potential conflict of interest is obvious.

It was important in the *Wood* case that the conflict of interest issue had been "raised" before the trial court repeatedly by the State's Solicitor even though it had not been raised on direct appeal or as an issue in the petition for certiorari. *Wood*, 450 U.S. at 264-65, n. 5.

There are two important distinctions between the *Wood* case and the case now before the Court. First, the conflict of interest issue was not raised at any time before the trial court. Second, contrary to the petitioners' suggestion, an actual conflict of interest is not apparent on the face of the trial record in the petitioners' case.

In the case at bar, the issue of ineffective assistance of counsel was not raised at any time before the trial court. The petitioners retained new counsel to represent them on direct appeal who raised the issue for the first time. The Arkansas Supreme Court refused to address the claim for lack of an objection before the trial court. *See McIntosh v. State*, 296 Ark. 167, 174, 753 S.W.2d 273, 276-77 (1988). The Arkansas Supreme Court has long followed the rule that an issue will not be considered on appeal when no objection was raised before the trial court. *See Wicks v. State*, 270 Ark. 781, 785-87, 606 S.W.2d 366, 369-70 (1980) (establishing a contemporaneous objection rule). Likewise, it is clear that a claim of ineffective assistance of counsel will not be considered on direct appeal if no objection was raised before the trial court. *McDougald v. State*, 295 Ark. 276, 748 S.W.2d 340 (1988); *Rogers v. State*, 289 Ark. 257, 711 S.W.2d 461 (1986); *Sumlin v. State*, 273 Ark. 185, 617 S.W.2d 372

(1981). This is so, even where the basis of the claim of ineffectiveness is a conflict of interest. *See Hayes v. State*, 269 Ark. 47, 598 S.W.2d 91 (1980); *Harris v. State*, 268 Ark. 425, 597 S.W.2d 75 (1980).

Certainly, a state may establish a contemporaneous objection rule. This Court has long recognized the states' right to do so. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). Nothing in *Wood v. Georgia* requires the states to consider an issue on direct appeal in the absence of an objection at trial.

However, the respondent acknowledges that this Court follows a "plain error" rule that allows it to correct an error "evident from the record" that is "otherwise within its jurisdiction to decide." *See* Supreme Court Rule 34.1(a). However, because the error of which the petitioners complain is not evident in the record, the respondent asserts that it would not be appropriate for this Court to invoke its plain error rule in the instant case.

The fact of joint representation, alone, does not create a conflict sufficient to find an attorney incompetent. *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Glasser v. United States*, 315 U.S. 60 (1942). In the case at bar, there was no conflict at all. Each of the petitioners took the stand in his own defense and denied any connection to or knowledge of the cocaine found in the van. (T. 273, 290, 303) Such a unified position with a single attorney will often give more weight to the defense rather than create a conflict sufficient to undermine the right to adequate representation. *See Holloway v. Arkansas, supra* at 482; *Murray v. State, supra* at 533.

The evidence in the trial record supports the defense counsel's theory of defense that is now challenged by the petitioners. Thus, the case at bar is easily distinguishable from the situation presented in *Wood v. Georgia, supra*, where a conflict of interest was strongly suggested by the record.

The petitioners have failed to show that the decision of the Arkansas Supreme Court is inconsistent with *Wood v. Georgia* or to establish that a conflict of interest is evident from the trial record. As such, the petitioners have failed to establish a sufficient reason for this Court to grant certiorari.

II.

REASONABLE SUSPICION TO BELIEVE THAT CONTRABAND EXISTS IS NOT REQUIRED BEFORE A LAW ENFORCEMENT OFFICER MAY REQUEST CONSENT TO SEARCH AT A ROADSIDE ENCOUNTER.

The petitioners argue that the Fourth Amendment requires that a law enforcement officer have reasonable or articulable suspicion to believe that contraband might be found inside a vehicle before he may request consent to search the vehicle at a roadside stop.

The facts of this case establish that the rented van in which the petitioners were riding was stopped for speeding. That the van was speeding is unquestioned. The law enforcement officer who made the stop noticed that the rental agreement showed the van had 1,500 miles on it when it was rented but that the odometer at the time of the stop showed approximately 5,000 miles. The officer asked the driver where they had been and was told that they had been to Oklahoma, which is a state adjacent to Arkansas and only a few hundred miles round trip, at most, from where the van was stopped. The officer asked for consent to search the van. Consent was given in writing. The reasons given by the officer for asking for consent to search were the mileage on the van and the fact that the driver appeared nervous.

The authority upon which the petitioners rely for arguing that the Fourth Amendment was violated by the officer's request for consent to search is *Garrett v. Goodwin*, 569 F.Supp. 106 (E.D. Ark. 1982). *Garrett* was a 42

U.S.C. § 1983 civil suit in which the plaintiffs sought to enjoin the Arkansas State Police from conducting unconstitutional roadblocks. The case citation mentioned above is a consent decree entered into between the parties in that lawsuit. The consent decree stated in part that "the police cannot request a consent to search without at least a reasonable or articulable suspicion to believe that there is contraband or criminal evidence where the police propose to look." *Id.*, 569 F.Supp. at 121. It is significant that the case involved a roadblock not a roadside stop. A consent decree has been defined as "a contract of the parties." 49 C.J.S. *Judgments* § 173. "It is similar to a judgment after trial on the merits in that it is binding on the parties . . . " but it "is not a judicial determination of any litigated right . . . " 49 C.J.S. *Judgments* § 173. It effects only the parties thereto and does not extend beyond the agreement between those entering into it. 49 C.J.S. *Judgments* § 178. Thus, the *Garrett* case does not involve a ruling grounded in the Fourth Amendment as applied to criminal cases and does not require that the exclusionary rule be invoked to suppress the cocaine at issue in this case.

The petitioners also argue that the rule that they seek to establish is not inconsistent with the decision of *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and is supported by this Court's decisions in *Florida v. Royer*, 460 U.S. 491 (1983) and *Terry v. Ohio*, 392 U.S. 1 (1968). However, none of these cases directly establishes the rule that the petitioners urge upon the Court.

While the respondent would concede that a law enforcement officer may not stop any vehicle at random and seek a consent to search that vehicle, no such circumstance exists in the instant case. The van at issue was stopped for speeding, a fact which is not challenged. None of the authority cited by the petitioners suggests that this fact alone would not provide a basis for a request for a consent to search. The petitioners merely argue that the Fourth

Amendment requires more. However, in the case at bar, there was more. The driver of the van clearly lied about where they had been and the driver appeared nervous to the officer. These facts establish reasonable suspicion sufficient to justify a request for a consent to search, if reasonable suspicion is required by the Fourth Amendment.

This case is not unlike the situation presented in *Terry v. Ohio, supra.* In *Terry,* a law enforcement officer noticed unusual behavior by Terry and a partner in front of a jewelry store. A third person arrived. Their behavior justified the officer's detaining them to ascertain their identification and to inquire as to their conduct. When the three were unresponsive to this inquiry, the officer patted Terry down and found a gun in his overcoat. Another gun was found on Terry's partner. The rest is history. However, it is clear that the officer in *Terry* did not have any specific reason to believe that Terry or his partner were armed. Yet the search was justified because of the need to protect the officer and others nearby. Thus, it is not always required that an officer have some articulable reason to believe that contraband may be found. A search or a request for consent to search can be justified for other reasons. In the present case, the facts that the driver of the van lied about where the petitioners had been and appeared nervous to the officer, justified the officer's request for consent to search the van. The officer did not have to have a specific reason to believe that contraband would be found.

The new rule that the petitioners argue for apparently is intended to curtail perceived abuses by the law enforcement community in obtaining consent to search when there is no justification for such a request. However, the paucity of case law that the petitioners acknowledge on this issue suggests that the issue is not percolating in the lower courts or perhaps that no one else has read the Fourth Amendment to require that which the petitioners believe is required. While the issue may be of some interest, the petitioners have failed to show that the issue justifies this Court's grant of certiorari.

III.

THERE WAS NO IMPLIED COERCION IN THE WRITTEN FORM UTILIZED TO "OBTAIN THE CONSENT TO SEARCH".

The petitioners next argue that the standardized written form used by the Arkansas State Police utilizes implied coercion to obtain a consent to search. As noted by the petitioners, the first line of the written form provides: "In order to cooperate in an investigation being conducted by the Arkansas State Police . . . " The above-quoted language according to the petitioners is inherently coercive. They also contend that such language was coercive in the instant case because no "investigation" was being conducted. The petitioners then offer wild speculation about what the form might imply to the person being asked to give his consent.

The Arkansas Supreme Court might have refused to address this argument at all because no objection was raised at trial. However, the Court rejected the argument on the merits after applying the totality of the circumstances test of *Schneckloth v. Bustamonte, supra.* The Court noted as follows:

> There were no coercive circumstances present, express or implied, in this case. A single officer asked the driver and the person listed on the rental agreement as the driver to consent and they readily did so. The court may also take into consideration whether a defendant knew he had the right to refuse consent in determining voluntariness although it is not a conclusive factor. *Schneckloth v. Bustamonte, supra.* In the present case the consent form contained the statement, "I have been informed by the above named State Police that I may refuse to consent to any search and that I may revoke my consent at any time." Considering the totality of the circumstances, we cannot say the trial judge was clearly wrong [in admitting the challenged evidence] nor was the decision contrary to the law.

McIntosh, 296 Ark. at 171, 753 S.W.2d at 275 (bracketed material added). The petitioners have omitted from their petition any mention of the other language contained on the form.

The respondent acknowledges that a consent to search obtained by the use of implied coercion would be invalid. However, as noted by the Arkansas Supreme Court, no coercion, express or implied, was utilized in the instant case. It is difficult to understand how a form, even one containing the complained of language, could be found to be coercive when it also advises the individual that he may refuse to give his consent or may revoke it at any time. The mistake that the petitioners make is in isolating part of the language on the form and viewing it alone. Such an approach is unfair and improper.

This Court should decline to grant certiorari as to this issue.

IV.

NO *DOYLE V. OHIO* VIOLATION OCCURRED AT THE PETITIONERS' TRIAL.

Through a strained interpretation of *Greer v. Miller*, 483 U.S. ____, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987), the petitioners argue that violation of the rule announced in *Doyle v. Ohio*, 426 U.S. 610 (1976), occurred at their trial, when a reference was made to their purported postarrest, post-*Miranda* silence.

The facts of this case establish that on direct examination of Officer Dale Best during the State's case-in-chief, Best testified that he advised each of the defendants of their rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and that each filled out a form documenting his understanding of the warnings. (T. 224) Each individual defendant was then taken to Best's office and questioned

separately. When asked whether he had been to California, each replied that he had not. (T. 224, 227)

After eliciting Best's testimony regarding the individual interview of Crawford and his statement that Crawford had denied going to California, the following exchange occurred:

> Q. What about the other subjects?
>
> A. They were all three seated in Sergeant Taylor's office after the individual interviews had been conducted, at which time I confronted him as to whether or not they had been in California, that we had received or obtained the motel receipts from the floor of the vehicle, and all three made no comment.

(T. 225) Defense counsel objected and requested a mistrial. The mistrial was denied. Defense counsel declined the trial court's offer to admonish the jury. (T. 226) The prosecutor then stated: "I think the defense's request is reasonable and I will not get into that." (T. 226)

The specific holding of *Doyle v. Ohio* is that the due process clause bars the use of a defendant's postarrest silence for impeachment purposes. *Id.*, 426 U.S. at 619. *See also Greer v. Miller*, 97 L.Ed.2d at 629. In *Greer v. Miller*, this Court found that no *Doyle* violation occurred where the prosecutor asked the defendant, "Why didn't you tell this story to anybody when you got arrested?", and where a defense objection was sustained and a curative instruction was given. It was also important in *Greer* that the state did not further pursue the line of questioning, nor was the issue raised in closing argument. Finally, the jury was instructed not to consider any evidence excluded pursuant to an objection. This Court concluded that, "The fact of Miller's postarrest silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference, and thus no *Doyle* violation occurred in this case." *Greer v. Miller*, 97 L.Ed.2d at 630.

In the case at bar, the prosecutor did not intentionally elicit Best's testimony that the petitioners failed to respond to his question regarding California. It is clear that neither the question nor the answer was intended as impeachment. When the prosecutor asked, "What about the other subjects?", Best had just testified that Crawford told him in his separate interview that he had not been in California. Clearly, the question was designed to allow Best to relate the nature of the other individual interviews in which the petitioners made similar responses. Officer Best's answer was non-responsive. This was made apparent when the prosecutor volunteered not to pursue the issue further and by the fact that he did not mention it in closing argument.

The petitioners argue that the facts presented in this case are different than those presented in *Greer v. Miller* because here the defense attorney refused the trial court's offer to admonish the jury to disregard Officer Best's comment. The petitioners suggest that this case presents a question that was in some way left open by the Court in *Greer v. Miller.* The petitioners seem to rely on footnote 8 of the opinion as support for their contention. Footnote 8 provides as follows:

> The first curative instruction occurred immediately after the trial court sustained defense counsel's objection to the prosecutor's question. Although the trial judge indicated that his ruling on the admissibility of this type of evidence was "for the time being," App. 32, he later told counsel at a bench conference that he had determined that this type of questioning was improper. *Id.*, at 43. Defense counsel did not request that any additional instructions be given to the jury. Before the jury began to deliberate, the trial judge nevertheless gave a second instruction to the jury that it should "disregard questions . . . to which objections were sustained." *Id.*, at 47.
>
> We normally presume that a jury will follow an instruction to disregard inadmissible evidence

> inadvertently presented to it, unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions, *Richardson v. Marsh*, 481 U.S. ____, ____, 95 L.Ed.2d 176, 107 S.Ct. 1702 (1987), and a strong likelihood that the effect of the evidence would be "devastating" to the defendant, *Bruton v. United States*, 391 U.S. 123, 136, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). We have no reason to believe that the jury in this case was incapable of obeying the curative instructions. And far from being "devastating," the fact of Miller's postarrest silence was at most "insolubly ambiguous." *Doyle*, 426 U.S. at 617, 49 L.Ed.2d 91, 96 S.Ct. 2240. Miller argues that the curative instructions should have been more specific. But Miller's trial counsel bore primary responsibility for ensuring that the error was cured in the manner most advantageous to his client. Once it became apparent that the judge was not going to grant a mistrial, it was the duty of counsel to determine what strategy was in his client's best interest.

Id., 97 L.Ed.2d at 630-31 n. 8.

Because it is clear from a proper reading of *Greer v. Miller* that no *Doyle* violation occurred at the petitioners' trial, the Arkansas Supreme Court did not err in rejecting the petitioners' argument that a *Doyle* violation had occurred. *McIntosh*, 296 Ark. at 172-73, 753 S.W.2d at 275-76. The Arkansas Court properly observed that the error in the instant case was even less apparent than the one made in *Greer*. *Id.* *Greer's* footnote 8 makes it clear that it was trial counsel's duty to determine what strategy was in his client's best interest. This would include a decision to refuse an admonition by the trial court which would only serve to reinforce the improper reference.

There is no reason for this Court to exercise its certiorari jurisdiction to review the *Doyle* issue argued by the petitioners. Despite the petitioners' claim to the contrary, the resolution of this issue by the trial court and

by the Arkansas Supreme Court is in no way inconsistent with this Court's decision in the *Greer* case and does not present any issue that was left unresolved by this Court in *Greer*.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on Writ of Certiorari will only be granted when there are special and important reasons therefor. This case contains no issues worthy of such review. The points raised by the petitioners do not establish that Constitutional error has occurred. The Arkansas Supreme Court properly affirmed the petitioners' convictions and sentences. Therefore, for these reasons and for the reasons and authorities cited in Respondent's Brief in Opposition to the Petition for Writ of Certiorari, respondent respectfully prays that this Court deny review on Writ of Certiorari.

Respectfully submitted,

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